

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION**

**COLE'S TOOL WORKS**

**PLAINTIFF**

**VERSUS**

**CIVIL ACTION NO. 2:06CV169-P-A**

**AMERICAN POWER CONVERSION  
CORPORATION**

**DEFENDANT**

**ORDER**

This cause is before the Court on the defendant's Motion for Partial Summary Judgment as to Certain Claims Made by Plaintiff and as to Plaintiff's Claim for Punitive Damages [113] and the plaintiff's Motion for Leave to Amend Pleadings [132]. The Court, having reviewed the motions, the responses, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

Defendant's motion seeks summary judgment as to Count Four of the Complaint. Count Four alleges a right of recovery premised on fraud, fraudulent concealment and negligent misrepresentation and omission. Defendant's memorandum brief attacked the factual and legal basis for those claims. Plaintiff's response addressed none of APC's arguments. Instead, it effectively conceded the motion by simply advising the Court that it "no longer desires to prosecute its causes of action for fraud, fraudulent concealment or negligent misrepresentation or omission." Accordingly, APC is entitled to judgment as a matter of law as to Count Four.<sup>1</sup>

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<sup>1</sup> Plaintiff's response also incorporated a motion to amend its complaint to "drop" the claims which formed the basis of the defendant's motion. The request is untimely inasmuch as the amendment deadline expired February 10, 2007. Absent a suitable explanation for plaintiff's dilatoriness and a more substantial basis for amendment than a desire to withdraw certain claim,

APC also seeks dismissal of Cole's Tool Works punitive damages claim. In support of its motion, defendant points out the high threshold for recovery and the concomitant greater burden of proof in contrast to the evidence of record. A thorough review of the record reveals no basis upon which a reasonable trier of fact could determine by clear and convincing evidence that APC acted with malice or reckless disregard to the rights or safety of others. In view of Cole's Tool Works inability to demonstrate a triable issue of fact on the matter of punitive damages, APC is entitled to dismissal of the punitive damages claim against it. Accordingly,

IT IS, THEREFORE, ORDERED AND ADJUDGED that the defendant's Motion for Partial Summary Judgment as to Certain Claims Made by Plaintiff and as to Plaintiff's Claim for Punitive Damages [113] is well-taken and should be, and hereby is, GRANTED. IT IS FURTHER ORDERED that plaintiff's claims for fraud, fraudulent concealment, negligent misrepresentation and omission and punitive damages should be, and hereby are, DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that the plaintiff's Motion for Leave to Amend Pleadings [132] is not well-taken and should be, and hereby is, DENIED.

SO ORDERED, this the 6<sup>th</sup> day of November, 2008.

/s/ W. Allen Pepper, Jr.  
W. ALLEN PEPPER, JR.  
UNITED STATES DISTRICT JUDGE

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leave to amend the pleadings is not justified. Plaintiff's aim is best accomplished through the drafting of the parties' final pretrial order.